WESTLAW

Distinguished by State v. Smith, | N.M., | December 14, 1956

Original Image of 189 P.2d 993 (PDF)

State v. Prince
Supreme Court of New Mexico. January 7, 1948 | 52 N.M. 15 | 189 P.2d 993 | 1948 -NMSC- 003 *(Approx. 9 pages)*

STATE
v.
PRINCE.

No. 5054.
Jan. 7, **1948**.
Rehearing Denied March 2, **1948**.

Synopsis

Error to District Court, Bernalillo County; Albert R. Kool, Judge.

Lewis **Prince** was charged with embezzlement, and to review an order sustaining a motion to quash the information, the **State** brings error.

Reversed, with directions.

West Headnotes (11)

Change View

1 **Embezzlement**
Essential elements of "embezzlement" are ownership of property involved by another than accused, accused's occupation of designated fiduciary relationship and acquisition of possession of property by reason of his employment or office, and fraudulent intent to deprive owner of property.

4 Cases that cite this headnote

146	Embezzlement
146k3	Elements of Offenses
146k4	In general

SELECTED TOPICS

Embezzlement

Elements of Offenses
Money or Valuable Property of Principal
Statutory Provisions
Purposes of Theft of Property Statute

Statutes

Enactment, Requisites, and Validity
Repealing Clause of the Later Act

Secondary Sources

Embezzlement by independent collector or collection agency working on commission or percentage

56 A.L.R.2d 1156 (Originally published in 1957)

...As is indicated by its title, this discussion is limited to independent collection agents or agencies not in the regular employment of any one customer but serving the public generally, to the exclusio...

Distinction between larceny and embezzlement

146 A.L.R. 532 (Originally published in 1943)

...The reported case for this annotation is **State** v. La France, 165 S.W.2d 624, 146 A.L.R. 529 (Mo. 1942).

Validity, Construction, and Operation of Federal Death Penalty Act, 18 U.S.C.A. secs. 3591 et seq.

195 A.L.R. Fed. 1 (Originally published in 2004)

...The Federal Death Penalty Act (FDPA), 18 U.S.C.A. §§ 3591 et seq., provides for death sentence proceedings in the federal courts. Many defendants in such proceedings have challenged the constitutionali...

See More Secondary Sources

Briefs

Brief for the United States

2019 WL 1112139
UNITED **STATES** OF AMERICA, Appellee, v. Jambulat TKHILAISHVILI, Defendant-Appellant. United **States** of America, Appellee, v. David Tkhilaishvili, Defendant-Appellant.
United **States** Court of Appeals, First Circuit.
Mar. 01, 2019

...FN1. Consistent with the practice at trial, the defendants are hereinafter referred to by first name. FN2. Citations are as follows: "[D. _]" refers to a docket entry; "[D.Br. _]" and "[D.Add. _]" r...

Brief of Appellee

2007 WL 1538392
UNITED **STATES** OF AMERICA, Appellee, v. Edward Leon FIELDS, Jr., Appellant.
United **States** Court of Appeals, Tenth Circuit.
Apr. 11, 2007

...FN1. Miranda v. Airzona, 384 U.S. 436 (1966). On appeal, Appellant contends, for the first time, that the federal government lacked territorial jurisdiction to prosecute these murders. (AOB 32). On the...

2 **Statutes**

In determining legislative intent in enacting statute, court may consider both prior and subsequent statutes in pari materia, past or anticipated evil or effect for which no adequate remedy is provided, means announced by legislature, and reason therefor.

2 Cases that cite this headnote

361	Statutes
361III	Construction
361III(A)	In General
361k1074	Purpose
361k1076	Purpose and intent
	(Formerly 361k184)
361	Statutes
361III	Construction
361III(F)	Extrinsic Aids to Construction
361k1182	Contemporary and Historical Circumstances
361k1184	History of statute
	(Formerly 361k215)
361	Statutes
361III	Construction
361III(G)	Other Law, Construction with Reference to
361k1210	Other Statutes
361k1216	Similar or Related Statutes
361k1216(3)	In pari materia
	(Formerly 361k215)
361	Statutes
361III	Construction
361III(G)	Other Law, Construction with Reference to
361k1210	Other Statutes
361k1219	Earlier and later statutes
	(Formerly 361k223.2(1.1), 361k223.2(1), 361k225)

3 **Statutes**

A statutory provision, expressly modifying or repealing certain provisions of previous statute, will be held to disclose full intent of framers of later statute as to how much or what portion of former statute was intended to be modified or repealed, on principle expressio unius est exclusio alterius.

361	Statutes
361III	Construction
361III(M)	Presumptions and Inferences as to Construction
361k1372	Statute as a Whole; Relation of Parts to Whole and to One Another
361k1377	Express mention and implied exclusion; expressio unius est exclusio alterius
	(Formerly 361k195)
361	Statutes
361V	Amendment
361k1454	Construction of Amendatory and Amended Statutes
361k1455	In general
	(Formerly 361k230)
361	Statutes
361VII	Repeal
361k1505	Construction of repealing statutes
	(Formerly 361k232)

Brief for the United States

1951 WL 82298
Joseph Edward MORISSETTE, Petitioner, v. United **States** of America.
Supreme Court of the United **States**
Oct. 08, 1951

...The opinion of the District Court overruling petitioner's motion for a new trial (Pet. 21-23) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 56-85) are reported at 18...

See More Briefs

Trial Court Documents

USA, v. MAALI, et al.

2005 WL 6073954
USA, v. MAALI, et al.
United **States** District Court, M.D. Florida.
Sep. 08, 2005

...The defendant was found guilty on Counts 54, 56, 57, 58, 59-71 of the Third Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses: The de...

The Woodlands Pride, Inc. v. Paxton

2023 WL 6242196
THE WOODLANDS PRIDE, INC., Abilene Pride Alliance, Extragrams LLC., 360 Queen Entertainment LLC., Brigitte Bandit, Plaintiffs, v. Warren Kenneth PAXTON, in an official capacity as Attorney General of Texas, Montgomery County, Brett Ligon, in an official capacity, City of Abilene, Taylor County, James Hicks, in an official capacity, Delia Garza, in an official capacity, Joe D. Gonzales, in an official capacity, Defendants.
United **States** District Court, S.D. Texas, Houston Division.
Sep. 26, 2023

...Pending before the Court is Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Document No. 10). On August 14, 2023, the Court ordered that the preliminary injunction hearin...

U.S. v. Muir

2014 WL 12966360
UNITED **STATES**, v. Roland Michael MUIR.
United **States** District Court, D. Maryland.
July 29, 2014

...Paul M. Flannery, Esquire Rosenberg Martin Greenberg LLP 25 South Charles Street, 21st Floor Baltimore, Maryland 21201 July 7, 2014 Dear Mr. Flannery: This letter, together with the Sealed Supplement, ...

See More Trial Court Documents

4 **Constitutional Law**

A penal statute should define act necessary to constitute offense with such certainty that person violating it must know that his act is criminal when he does it.

6 Cases that cite this headnote

92	Constitutional Law
92VIII	Vagueness in General
92k1130.7	Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties
92k1130.10	Statutes

(Formerly 110k13.1, 110k13.1(1), 110k13(1), 110k13)

5 **Constitutional Law**
Embezzlement

The statute, declaring any person who converts another's property in such person's possession to his own use or disposes thereof in way not authorized by owner or law guilty of embezzlement, is unconstitutional as making a person's appropriation to his own use of another's property, which he believes to be his own, a felony, and as uncertain in meaning, vague and indefinite, and depriving accused of due process of law. 1941 Comp. § 41-4519; U.S.C.A.Const. Amends. 6, 14.

11 Cases that cite this headnote

92	Constitutional Law
92XXVII	Due Process
92XXVII(H)	Criminal Law
92XXVII(H)2	Nature and Elements of Crime
92k4502	Creation and Definition of Offense
92k4509	Particular Offenses
92k4509(17)	Larceny, embezzlement, and receiving stolen property

(Formerly 92k258(3.1), 92k258(3), 92k258)

146	Embezzlement
146k2	Statutory provisions

6 **Embezzlement**

An information, charging essentials of embezzlement, does not manifest legislative intent to define such offense in statute omitting elements of entrustment and fraudulent conversion, as statute, not charge thereunder, prescribes rule of conduct and warns against transgression. 1941 Comp. § 41-4519.

3 Cases that cite this headnote

146	Embezzlement
146k2	Statutory provisions

7 **States**

To sustain statute as exercise of **state's** police power, purpose thereof must appear to be prevention of certain manifest or anticipated evil or preservation of public health, safety, morals, or general welfare.

1 Case that cites this headnote

360	**States**
360I	Status, Powers, and Functions
360I(A)	In General
360k308	Government Powers
360k310	Police Power
360k310(6)	Basis for and Subjects of Exercise of Police Power
360k310(8)	Health, safety, morals, and welfare in general
	(Formerly 360k21(2), 92k1066, 92k81)

8 **States**

The “police power” extends to all great public needs and may be put forth in aid of what is sanctioned by usage or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to public welfare.

1 Case that cites this headnote

360	**States**
360I	Status, Powers, and Functions
360I(A)	In General
360k308	Government Powers
360k310	Police Power
360k310(6)	Basis for and Subjects of Exercise of Police Power
360k310(8)	Health, safety, morals, and welfare in general
	(Formerly 360k21(2), 92k1066, 92k81)

9 **Embezzlement**

The statute, declaring any person converting to his own use another's property in his possession or disposing thereof in way not authorized by owner or law guilty of embezzlement, cannot be sustained as reasonable exercise of police power. 1941 Comp. § 41-4519; U.S.C.A. Const.Amends. 6, 14.

1 Case that cites this headnote

146	Embezzlement
146k2	Statutory provisions

10 **Statutes**

Where repealing act and act sought to be repealed show legislative intent that repealing clause shall be valid in all events, such clause will be held valid, but where repeal is obviously intended to clear way for operation of act containing repealing clause and displacement of old law with new one, which is unconstitutional, repealing clause becomes dependent and inoperative and falls within main purpose of act containing it.

2 Cases that cite this headnote

361	Statutes
361VII	Repeal
361k1502	Invalidity of repealing statute
	(Formerly 361k168)

361	Statutes
361VII	Repeal
361k1505	Construction of repealing statutes
	(Formerly 361k232)

11 **Embezzlement**

The clause of invalid 1923 embezzlement act, repealing valid 1915 act declaring person entrusted with an embezzling or fraudulently converting to his own use property which may be subject of larceny guilty of larceny, failed when purpose of repealing act failed and hence did not repeal prior act, so that information charging crime under 1915 act was sufficient, though later act, on which information was based, did not define embezzlement. 1941 Comp. § 41-4519; Code 1915, § 1543.

2 Cases that cite this headnote

146	Embezzlement
146k25	Indictment or Information
146k26	Requisites and sufficiency in general
	(Formerly 361k168)

Attorneys and Law Firms

***994 *16** C. C. McCulloh, Atty. Gen., Robert V. Wollard Asst. Atty. Gen., and Harry D. Robins, Sp. Asst. Atty. Gen., for plaintiff in error.

Lewis R. Sutin, of Albuquerque, for defendant in error.

Opinion

***17** COMPTON, Justice.

{1} Defendant in error was charged by an information containing two counts, based upon Section 41–4519, New Mexico Statutes, 1941 Compilation, which reads as follows: 'Any person being in the possession of the property of another, who shall convert such property to his own use, or dispose of such property in any way not authorized by the owner thereof, or by law, shall be guilty of embezzlement * * *' Sec. 2, Ch. 70, Laws 1923, N.M.Sts.

{2} The information charged:

'That in the county of Bernalillo, **State** of New Mexico, the said Lewis **Prince**, being entrusted in the possession of certain monies of Markus and Markus, a partnership, did on the 20th day of March, 1946, fraudulently convert the sum of forty-one dollars and $^{41}/_{100}$ ($41.41) to his own use or did dispose of such property in a way not authorized by the owner thereof or by law.

'Count 2. On the 2nd day of August, 1946, in the same county and **state**, the said Lewis **Prince**, being entrusted in the possession of certain monies of Markus and Markus, a partnership, did fraudulently convert the sum of Fifty-four and $^{50}/_{100}$ ($54.50) dollars to his own use or did dispose of such property in a way not authorized by the owner thereof or by law.'

{3} The statute in question expressly repealed a prior statute which read: 'If any person who shall be *entrusted* with any property which may be the subject of larceny, shall *embezzle or fraudulently convert* to his own use, or *shall secrete with intent to embezzle or fraudulently convert* to his own use any such property, he shall be deemed guilty of larceny.' Section 1543, Code 1915. (Emphasis ours.)

{4} From an order sustaining a motion to quash the information as unconstitutional and void, plaintiff brings the case here for review by writ of error, assigning the following as error:

1. The court erred in making its conclusions of law.

2. The court erred in dismissing the information.

3. The court erred in dismissing the defendant.

{5} These are argued under the single point: 'That Section 41–4519 of the 1941 Compilation (being section 2, Ch. 70, Laws of 1923) is constitutional and that the information filed under said statute alleging all essential elements constituting the offense of embezzlement should not have been quashed as the defendant was sufficiently apprised of the offense charged.'

{6} Plaintiff contends that the legislature intended the statute to include all essentials for the crime of embezzlement, and that the *information* is so limited as to come ***18** within legislative intent. It is also contended that the legislature in the exercise of police power had the authority to define embezzlement by saying what acts constituted the offense.

{7} On the other hand, defendant contends the statute in question does not define embezzlement, as it does not include essential elements, viz., entrustment and fraudulent conversion. He also contends that the statute cannot be sustained as a reasonable exercise of police power.

***995** {8} The single question for our determination is whether the statute may be sustained when it omits certain essential elements necessary to constitute the crime of embezzlement, viz., entrustment and fraudulent appropriation.

1 {9} The essential elements of the offense of embezzlement are: (a) That the property belonged to some one other than the accused. (b) That the accused occupied a designated fiduciary relationship and that the property came into his possession by reason of his employment or office. (c) That there was a fraudulent intent to deprive the owner of his property. 29 C.J.S., Embezzlement, § 5; Underhill's Criminal Evidence, Sec. 490, pages 4003, 4004. Section 1543, supra, was before the legislature when Section 41–4519, supra, was enacted. It knew the essential elements necessary to constitute the offense of embezzlement. It expressly repealed that effective statute.

2 {10} In determining legislative intent, the court may consider both prior and subsequent statutes in pari materia, the evil or effect, past or anticipated, for which no adequate remedy is provided, the means announced by the legislature and the reason therefor. We know of no safer way to ascertain legislative intent than what it says.

3 {11} 'When in any enactment there appears an express modification or repeal of certain provisions in the former enactment, such express modification or repeal of the portions thereof thus affected will be held to disclose the full intent of the framers of the later enactment as to how much or what portion of the former it was intended to modify or

repeal, this upon the principle 'expressio unius, est exclusio alterius." (Express mention of one thing implies the exclusion of the other.) (Translation supplied by appellee.) Fay v. District Court, 200 Cal. 522, 254 P. 896, 903.

4 5 {12} A penal statute should define the act necessary to constitute an offense with such certainty that a person who violates it must know that his act is criminal when he does it. Then can it be said a person having property of another in his possession, which he believes to be his own, could possibly know that he had violated the law when he sells is or otherwise appropriates it to his own use. But it clearly appears from reading the statutes in question, such appropriation is made a crime. Under its ***19** terms there is no defense for simple conversion, and to make an act, innocent itself, a crime, and criminals of those who might perchance fall within its interdiction, is inconsistent with law. The statute is uncertain in its meaning, vague and indefinite. A person charged thereunder is deprived of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United **States**. Cf. **State** v. Lantz, 90 W.Va. 738, 111 S.E. 766, 26 A.L.R. 894; Ex parte Deniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, 323; Ex parte Bales, 42 Okl.Cr. 28, 274 P. 485; **State** v. Park, 42 Nev. 386, 178 P. 389.

6 {13} Plaintiff urges that since the essentials of embezzlement are included in the information, that it manifests the legislative intent. It is the statute not the charge under it that prescribes the rule of conduct and warns against transgression. In Lanzetta v. **State** of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 619, 83 L.Ed. 888, in holding the statute unconstitutional, the Supreme Court said: 'If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the **State** commands or forbids.' Thornhill v. **State** of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093.

{14} Other authorities supporting this principle are assembled in **State** v. Menderson, 57 Ariz. 103, 111 P.2d 622.

7 8 {15} Plaintiff also urges that in the exercise of police power the legislature has authority to define embezzlement and declare what constitutes an offense. It must be conceded that such power inheres in the **state** but in order that a statute may be sustained as an exercise of such power it must appear that the enactment has for its purpose the prevention of certain manifest or anticipated evil, or the preservation of the public health, safety, morals, or general ***996** welfare. As defined by Justice Holmes: 'It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' Noble **State** Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186, 188, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann.Cas.1912A, 487.

9 {16} The power thus defined, and a prior valid statute having been repealed, we are unable to determine that there existed, or was anticipated, that condition of public health, safety, morals or preponderant opinion making the statute in question immediately necessary for the public welfare. ***20** No additional power is conferrred by the new statute, unless it has for its purpose to embrace within its ambits the guilty and innocent alike. This would afford no reasonable ascertainable standard of guilt, and is therefore too vague and uncertain to be enforced. The accused, though presumed to be innocent, if proven guilty of simple conversion, nevertheless is a felon under the statute, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United **States**.

{17} To sustain the statute, we would supply by intendment, words of limitation, and this would be judicial legislation. The statute cannot be extended or sustained as a reasonable exercise of police power. **State** v. Henry, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805; De Graftenreid v. Strong, 28 N.M. 91, 206 P. 694; Moruzzi v. Federal Life & Casualty Company, 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407; Tyson v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236; **State** v. Menderson, supra, 57 Ariz. 103, 111 P.2d 622; **State** v. Burns, 53 Idaho 418, 23 P.2d 731; Gonzales v. Sharp & Fellow Construction Co., 48 N.M. 528, 153 P.2d 676; Id., 51 N.M. 121, 179 P.2d 762; People v. Mooney, 87 Colo. 567, 290 P. 271.

{18} Plaintiff in support of its position cites Commonwealth v. Barney, 115 Ky. 475, 74 S.W. 181; **State** v. Brooken, 19 N.M. 404, 143 P. 479, L.R.A.1915B, 213, Ann.Cas.1916D, 136, and **State** v. Shedoudy, 45 N.M. 516, 118 P.2d 280. These cases are not authority for the principle asserted. In Commonwealth v. Barney, supra, the court, in the absence of a prior, valid and effective statute, sustained the enactment as a reasonable exercise of pplice power. Subsequently, in Burnam v. Commonwealth, 228 Ky. 410, 15 S.W.2d 256, it refused to do so where a prior valid statute had been repealed. In **State** v. Brooken, supra, there existed no prior effective statute and it became necessary to ascertain the legislative intent and thus supply the statute by intendment. The same is said of **State** v. Shedoudy, supra. To sustain the statute, we must hold that the legislature in the exercise of police power retained in effect provision of a penal statute expressly repealed by it. This is contrary to all rules of statutory construction.

{19} Our conclusion leaves the **state** without a statute defining embezzlement unless we determine whether section 1543, supra, has been disturbed by the repealing clause of chapter 70, Laws of 1923, N.M.St. supra.

{20} The public welfare impels us to decide this point.

10 {21} The rule regarding the construction of repealing clauses is likewise a question of legislative intent. Where it appears from the repealing act, and the act sought to be repealed, that it was the legislative intent that the repealing clause should, in all events, be valid, such clause will be held to be valid; but where it is obvious that ***21** where the repeal is intended to clear the way for the operation of the act containing the repealing clause and displacing the old law with the new, then, if the new law be unconstitutional the repealing clause becomes dependent and inoperative and falls within the main purpose of the act containing it. An unconstitutional law being void is not inconsistent with any former law. **State** v. Candelaria, 28 N.M. 573, 215 P. 816, and cases cited. People v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349, I Lewis' Sutherland, on Stat. Const.P. 245, citing cases. 59 C.J. 939. Tims v. **State**, 26 Ala. 165; People v. Fleming, 7 Colo. 230, 3 P. 70. Cook County v. Healy, 222 Ill. 310, 78 N.E. 623; **State** v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A.,N.S., 344, Ann.Cas.1913A, 1247; **State** v. McClear, 11 Nev. 39. ****997** City of Portland v. Coffey, 67 Or. 507, 135 P. 358; Porter v. Board of Com'rs of Kingfisher County, 6 Okl. 550, 51 P. 741.

11 {22} It is evident that the legislature intended to displace the embezzlement law by substituting a new one. We are not satisfied that the legislature would have repealed the former act if it had not been supposed that the new act adopted in lieu of it was valid.

{23} This being so, under the rule announced, the repealing clause necessarily fails when the purpose of the act fails and no former act is repealed. It follows that the embezzlement law existing prior to the Act of 1923 was not repealed. The judgment of the court was correct in holding that Section 41–4519, supra, did not define embezzlement, but the information having charged a crime under the act sought to be repealed, the court erred in discharging appellant.

{24} The judgment is reversed, with directions to the trial court to reinstate the case upon its docket and proceed in a manner not inconsistent herewith, and it is so ordered.

BRICE, C. J., and LUJAN and McGHEE, JJ., concur.

SADLER, Justice (dissenting).

{25} The prevailing opinion is correct in directing a reversal of the order of the trial court quashing the criminal information filed below. The holding that the statute in question is unconstitutional as denying to an accused due process of law under the Fourteenth Amendment to the Constitution of the United **States** is plainly erroneous. It convicts the legislature of sheer stupidity to hold that in enacting 1941 Comp. § 41–4519, it intended to authorize punishment of the innocent and well intentioned along with the venal and criminally disposed. The element of fraudulent intent necessarily is to be read into the statute and so construed, it is perfectly valid. **State** v. Shedoudy, 45 N.M. 516, 118 P.2d 280; ***22** **State** v. Nance, 32 N.M. 158, 252 P. 1002; Commonwealth v. Barney, 115 Ky. 475, 74 S.W. 181. United **States** v. P. Koenig Coal Co., 270 U.S. 512, 46 S.Ct. 392, 70 L.Ed. 709.

{26} Every accused who, over the past quarter of a century, approximately, has served time following conviction under this statute, will be made none the happier to learn the whole proceeding was a nullity. All now in prison after similar convictions under the statute should forthwith be given their freedom in an effort to make such atonement as the **state** presently can for the wrong inflicted. Resurrection of the old statute, repealed by the law enacting the one here challenged, if correctly accomplished on the theory employed by the majority, neither softens nor palliates the sting of unwarranted convictions under the one now stricken down. These unfortunate consequences all rest on the majority conclusion that the statute is no good. In my opinion, it is good. Hence, the untoward consequences mentioned in no way disturb me.

{27} How much better to appraise the questioned statute on an assumption of legislative care and competence, rather than under an imputation of stupidity or carelessness, and so viewed, endeavor to find reason and purpose in its enactment. Thus considered, a perfectly logical legislative enactment emerges. Granting that under the law repealed, 'entrustment' and existence of a 'fiduciary relationship' are elements of the crime of embezzlement, Code 1915, § 1543, what is to prevent the legislature in the exercise of its undoubted power to define and declare public offenses and prescribe the punishment therefor (**State** v. Boloff, 138 Or. 568, 4 P.2d 326, 7 P.2d 775, and Sheehan v. Superintendent of Concord Reformatory, 254 Mass. 342, 150 N.E. 231) from broadening the scope of the offense? None can question that it is an immoral act for one in possession of the property of another, regardless of how such possession came about, to convert same to his own use with fraudulent intent. The legislature says it shall constitute the crime of embezzlement. Neither principle nor precedent deny its power to do so. Both repudiate our right to say it cannot.

{28} The trial court should be instructed to overrule the motion to quash and proceed with the trial of defendant. The majority having concluded otherwise, I dissent.

All Citations

52 N.M. 15, 189 P.2d 993, 1948 -NMSC- 003

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